85-1282

Supreme Court, U.S.
FILED
JAN 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

# Supreme Court of the United States

## OCTOBER TERM 1985

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IRVING EAR, NOSE, THROAT & ALLERGY CLINIC
and HERBERT R. KASNETZ, M.D.,

*Petitioners*

*VS.*

GROUP HOSPITAL SERVICE, INC.,
GROUP LIFE & HEALTH INSURANCE COMPANY
and GROUP MEDICAL AND SURGICAL SERVICE
COMPANY, d/b/a BLUE CROSS AND BLUE
SHIELD OF TEXAS,

*Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

The issues in this appeal are as follows:

1. Whether the District Court erred in ruling that the Respondents did not have the capacity as a matter of law to combine or conspire and did not, in fact, combine or conspire to violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Whether the District Court erred in ruling that Petitioners did not introduce sufficient evidence of the requisite anticompetitive effect of Respondents' conduct to warrant submission of the case to the jury.

3. Whether the District Court erred in ruling that the Petitioners did not present sufficient evidence of their claim of per se violation to warrant submission of the issue to the jury.

4. Whether the District Court erred in holding that the evidence, when viewed most favorably to Petitioners, did not warrant submission to the jury of the boycott issues.

## LISTING OF PARTIES

itioners are:

Irving Ear, Nose, Throat & Allergy Clinic and
Herbert R. Kasnetz, M.D.

spondents are:

Group Hospital Service, Inc.
Group Life and Health Insurance Company
Group Medical and Surgical Service Company
All of the Respondents do business under the name
Blue Cross and Blue Shield of Texas

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COMPANY, d/b/a BLUE CROSS AND BLUE
SHIELD OF TEXAS,

*Respondents*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

Petitioners respectfully request the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case dated October 31, 1985.

## OPINION BELOW

The unpublished opinion of the Court of Appeals, dated October 31, 1985, is reproduced as Appendix A.

## STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on October 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provision involved is Section 1 of the Sherman Act, 15 U.S.C. § 1, reproduced in Appendix B.

## STATEMENT OF THE CASE

Petitioners, Plaintiffs-Appellants below, are Dr. Herbert R. Kasnetz, an ear, nose, throat and allergy specialist, and his professional association, Irving Ear, Nose, Throat & Allergy Clinic. Petitioners brought this action in the District Court against Respondents, three Blue Cross/Blue Shield companies: Group Hospital Service, Inc. ("GHS"), Group Life and Health Insurance Company ("GLH"), and Group Medical and Surgical Service ("GMSS"). Petitioners alleged that Respondents had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by their (1) horizontal and vertical price fixing, (2) horizontal group boycott, and (3) restraint of trade. At the close of Petitioners' case after five days of jury trial, the District Court directed a verdict in favor of Respondents. The Court of Appeals affirmed.

Kasnetz began his medical practice in 1967 and built his clinic in 1975. He saw approximately 700 patients per week and worked on the staff of a local hospital. Most of his patients relied upon some form of insurance for payment,

and approximately one-third of them were insured by Respondents, together the state's then largest insurer.

In 1976, Respondents adopted a "cost containment" program designed to control physicians' fees through the use of economic sanctions against doctors they considered to be charging excessive fees (Tr. 31-32, 38-39, 72-75). The purpose of the program was to curtail ongoing corporate operating losses through physician "fee regulation" (PX 7; Tr. 31) in order to reduce premiums and maintain Respondents' market share (Tr. 39, 67-68).

Respondents' program first divided Texas into several regions and arrayed its statewide compilation of historic claim charges by medical specialty in order to determine the 90th percentile charge for each service item (Tr. 77-78). Staff physicians then used their subjective judgment to determine which services were reimbursable as necessary for the treatment of a particular problem and which charges were unnecessary and would not be paid (Tr. 288-294). All physicians filing claims with Respondents were assigned a number, and as claims were received, they were compared to the profiles to determine if they exceeded internal limits and if services were being rendered which the guidelines regarded as unnecessary. Once Respondents identified those physicians whose charges or services exceeded the profiles, they attempted to "rehabilitate" them (Tr. 73, 77-78) by first having a representative contact them directly and suggest that they reduce their charges (Tr. 132-133). If the physicians did not comply, Respondents applied pressure by contacting local medical societies requesting peer group review (Tr. 98-99, 133-134, 222-230). If the doctors still resisted, Respondents then placed them on "prepayment review" which consisted of a course of economic sanctions designed to force the doctors to charge the same prices as others within their specialty. Kasnetz was one of these doctors.

The first and most devastating step in the program was that of dishonoring assignments and making claim payments to the patients rather than the doctors (Tr. 99, 132, 134, 139, 140, 146, 147, 202, 204, 252, 253, 435). Respondents knew that this would result in many patients keeping the checks, thus destroying essential harmonious relationships between the doctors and their patients and creating financial pressure on the doctors from reduced cash flow (PX 4; Tr. 48, 70-72, 137, 362).

Respondents simultaneously began making partial, rather than full, payments to the patients (Tr. 214-215, 272, 436-437), eliminating payments for certain services which they deemed to be "medically unnecessary" (Tr. 290-291), delaying payments (Tr. 293, 438), "losing" claims (Tr. 438), and suggesting that his patients find other doctors (Tr. 490, 695-696). Some of Kasnetz' patients and their group insurance representatives were told that Kasnetz was rendering medically unnecessary services (Tr. 207-208, 210, 291) and that the patients' claims would be paid if they used other doctors (Tr. 213). Through an alleged investigation of fraudulent billing practices, Respondents inferred that Kasnetz was dishonest (Tr. 314). The Respondents' medical director also filed complaints with the local medical society and the Texas State Board of Medical Examiners in an attempt to get Kasnetz to reduce his fees and the frequency of his allergy injections (Tr. 226-228).

Respondents' conduct had a devastating effect upon Kasnetz' practice. At trial, several patients testified that they had stopped going to Kasnetz because of the problems caused by Respondents (Tr. 435-439, 614, 640, 658, 677-678, 696) and that they had either warned away other potential patients or withheld recommendations of Kasnetz because of these problems, all despite the fact that they universally

appreciated Kasnetz' ability as a doctor and found his treatments to be satisfactory (Tr. 615-616, 640, 678-679). As a direct result, Petitioners suffered severe losses of patients and hundreds of thousands of dollars in income between the years 1976 and 1983 (Tr. 408-421, 773, 778, 780, 794), with a commensurate corresponding drop in the amount of medical supplies ordered from out-of-state suppliers (Tr. 393). The number of patients treated declined from 700 per week to less than 100, and the surgeries performed dropped dramatically (PX 61, 62; Tr. 408, 420-421, 439). Petitioners refused to capitulate to Respondents, but attempts to offset the losses were futile (Tr. 439-440). Petitioners then brought this action.

The District Court directed a verdict for Respondents at the close of Petitioners' presentation of their case. The District Court concluded that the Respondent companies did not have the legal capacity as a matter of law to combine or conspire and did not, in fact, combine or conspire to violate Section 1 of the Sherman Act. The District Court also concluded that the evidence, when viewed most favorably to Kasnetz, did not warrant submission of the price fixing and boycott issues to the jury. The District Court found that Kasnetz did not introduce requisite evidence of the anticompetitive effect of Blue Cross/Blue Shield's conduct in order to submit the case to the jury.

The Court of Appeals affirmed the trial court's decision. The Court of Appeals agreed with the District Court that GHS and GLH were incapable of conspiring with each other. The Court of Appeals found it "unnecessary" to decide whether GMSS was capable of conspiring with the other two defendants. Thus, the Court of Appeals did not decide the conspiracy issue because it considered the alternate ground for District Court's ruling to be "solidly

grounded in existing law." On that alternate ground, the Court of Appeals ruled that Kasnetz had failed to present evidence sufficient for submission to the jury of his restraint of trade claim under a rule of reason analysis or of his claim of a per se violation.

## REASONS FOR ALLOWING THE WRIT

This petition should be granted so that the Court may resolve the following issues:

1. *Whether the District Court erred in ruling that the Respondents did not have the capacity as a matter of law to combine or conspire and did not, in fact, combine or conspire to violate Section 1 of the Sherman Act, 15 U.S.C. § 1.*

The District Court held on the basis of this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*[1] that the three Respondents were legally incapable of combining or conspiring with one another and that, therefore, they did not violate Section 1 of the Sherman Act. The Court of Appeals acknowledged that, after *Copperweld*, GHS and GLS, its wholly owned subsidiary, were incapable of combining or conspiring. The Court of Appeals, however, specifically elected not to decide, on the basis of *Copperweld*, whether GMSS was incapable of conspiring with the other two Respondents.

This Court in *Copperweld* held that a corporation and its wholly owned subsidiary were incapable of combining or conspiring, but this Court expressly reserved comment on the issue of conspiracy among non-owned corporations.[2]

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[1] 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).

[2] "We do not consider under what circumstances, if any, a parent [corporation] may be liable for conspiring with an affiliated corporation it does not completely own." *Id.* at 2740. In recognition of this reservation, but yet in stark opposition to its decision in the case at bar, the Fifth Circuit has ruled that a case which "does not involve a parent and its wholly-owned subsidiary" "presents a different question from *Copperweld.*" *Plueckhahn v. Farmer's Ins. Exchange*, 749 F. 2d 241, 245 n. 7 (5th Cir. 1985).

GMSS is not a wholly owned subsidiary of either of the other two Respondents.

The separate Respondent companies control a large share of the health and accident insurance in Texas and in fact were dominant in the market. Not only are the individual companies separately chartered corporations which have a pervasive influence in a select market, they maintain their separateness in claims payment procedures, and they account separately among themselves as shown by the separate 1099 forms which Petitioners received from them each year. Insurance companies in Texas conduct business within the guidelines prescribed by the particular chapter of the Insurance Code of their incorporation. No insurance company, unlike a typical business corporation, can be chartered to conduct all lines of business. As such, they are necessarily separate, and are thereby forced by law to operate within separate segments of the industry. They cannot operate as alter egos, even if owned as a subsidiary or are part of a controlled group.

GHS, a nonprofit corporation, owns GLH, a company organized for profit. The third company, GMSS, is a nonprofit mutual assessment company operating for, and at the direction of, its members. There is no unity of power or ownership among the three. GMSS is chartered as a statewide mutual assessment company pursuant to chapters 13 and 14 of the Texas Insurance Code. As such, it is owned by its members, the policyholders.[3] Article 13.02 of the Texas Insurance Code provides that "every mutual assessment life,

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[3]Tex. Ins. Code arts. 14.02 and 14.11 (1981). Article 14.11 states that "membership in the association shall be confined to persons qualified under the provisions of the bylaws. Such membership shall equal the qualifying membership at all times...." Article 14.02 states in pertinent part that " 'member' shall include policyholders or any persons insured by an association, by whatsoever means the insurance may be made effective."

health and accident insurance company...may amend or extend its charter by compliance with the general corporation laws of Texas." Article 14.05 further provides that the "bylaws of any association may be amended by a majority of the members." Therefore, should the members of GMSS so choose, they can offer any line of life or health insurance, including lines which may directly compete with those offered by GHS and GLH, and those corporations would be powerless to stop it. Any alleged absence of competition between these companies in the past or present is not controlling on the issue of ability to conspire. What is controlling is GMSS' potential ability to compete with GHS and GLH.

2. *Whether the District Court erred in ruling that Petitioners did not introduce sufficient evidence of the requisite anticompetitive effect of Respondents' conduct to warrant submission of the case to the jury.*

Petitioners clearly introduced sufficient evidence of the anticompetitive effect of Respondents' actions. In order to succeed in a private anti-trust action under the rule of reason, a plaintiff must show injury to competition, not just to himself. He must show that the alleged unreasonable restraint tends to or is calculated to prejudice the public interest and that his "injury is of the type that the anti-trust laws were intended to prevent and flows from that which makes defendants' acts unlawful. The injury must reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation."[4]

The Court of Appeals ruled that Petitioners had "utterly failed to present proof from which a reasonable person could infer an unreasonable restraint of trade." The Court

[4] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).

of Appeals based its ruling, however, on its belief that Petitioners did not demonstrate injury to competition in the market area or show how Respondents' program affected competition among other physicians within Kasnetz' specialty or among physicians in his geographic area. Petitioners did, in fact, demonstrate injury to competition in the geographic market area and among physicians of Kasnetz' speciality. Petitioners' economic expert, Dr. Wade Clifton, testified at trial in support of these contentions.[5]

3. *Whether the District Court erred in ruling that the Petitioners did not present sufficient evidence in their claim of per se violation to warrant submission of the issue to the jury.*

Both the District Court and the Court of Appeals held that the Petitioners presented insufficient evidence on their claim of per se violation to warrant submission of the issue to the jury. Section 1 of the Sherman Act of 1890 prohibits *every* agreement in restraint of trade.[6] This Court in *Standard Oil Co. of New Jersey v. United States*[7] recognized that inquiry under its rule of reason ended once a price fixing agreement was proved, for there was "a conclusive presumption which brought [such agreements] within the statute." Later, in *United States v. Socony-Vacuum Oil Co.,*[8] this Court acknowledged that "any combination which tampers with price structures is engaging in unlawful activity." "Whatever economic justification particular price fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of the actual or potential threat to the central nervous system of the economy."[9] Then, in *Kiefer-Stewart Co. v.*

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[5]Trial transcript, pp. 767-768, reproduced in Appendix C.
[6]15 U.S.C. § 1; *see* Appendix B.
[7]221 U.S. 1, 31, 65 S. Ct. 502, 517, 55 L. Ed. 619 (1911).
[8]310 U.S. 150, 218, 60 S. Ct. 811, 841, 84 L. Ed. 1129 (1940).
[9]*Id.* 310 U.S. at 226.

*Joseph E. Seagram and Sons, Inc.*,[10] This Court held that maximum price fixing agreements were per se illegal. In *Arizona v. Maricopa County Medical Society*,[11] this Court held that "the anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

While Respondents may argue that the price fixing here is a novel form of price restraint, it is price fixing nonetheless as shown by their own characterization of the restraints as "fee regulation." Respondents went beyond the mere announcement of what they had considered "reasonable charges" and sought, through coercive measures, to impose price limits and change the practices of target doctors. In taking affirmative action to achieve uniform adherence to its "fee regulations," Respondents took away Petitioners' free choice as to what Kasnetz' charges should be considering his skill and level of expertise in his area of practice, and thus impermissibly interfered with Petitioners' medical practice.[12] The separate Respondents conspired among themselves to fix the prices which they determined all physicians in Texas should charge.

This case does not present the traditional price fixing arrangements usually seen by the courts, but Petitioners proved the elements of both vertical and horizontal per se price fixing. Physicians play an important role at the Respondent companies in the establishment of the "usual, customary, and reasonable" levels for physician charges. Substantial physician control in Blue Cross/Blue Shield situations is fairly common. This physician control estab-

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[10] 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951).

[11] 457 U.S. 332, 351, 102 S. Ct. 2466, 2476, 73 L. Ed. 2d 48 (1982).

[12] *United States v. Parke, Davis and Co.*, 362 U.S. 29, 46-47, 80 S. Ct. 503, 513, (1960).

lishes a vertical link and competitive relationship between Respondents and Petitioners for anti-trust purposes.

In *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*,[13] the Court examined the role of physicians in the operation of Blue Cross/Blue Shield's plans. Two insurance plans, Blue Shield of Virginia and Blue Shield of Southwestern Virginia, refused to pay for charges by clinical psychologists unless billed through a physician. One of the methods used to control the billing practices of the clinical psychologists was to refuse direct payment for services not billed through a physician,[14] essentially the same practice employed here. The appellate court reversed the lower court's ruling which had ignored the role of physicians in the plans and held that physician control brought the Blue Shield actions within the purview of Section 1 of the Sherman Act.[15] Here, Respondents' physicians in management made the decisions to fix the prices that physicians should charge and then went about enforcing those price restrictions. The degree of physician control of the Respondents is a proper fact question for the jury.

This Court has held that the setting of maximum fees chargeable by physicians is per se horizontal price fixing.[16] There, as here, the price restraint tended to provide the same economic rewards to all medical practitioners regardless of their skill, experience, training or innovation. The court stated that such restraints could discourage entry into the market and deter experimentation and new developments by individual entrepreneurs.[17] Here, Respondents'

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[13]624 F. 2d 476 (4th Cir. 1980).
[14]*Id.* at 478.
[15]*Id.* at 481.
[16]*Arizona v. Maricopa County Medical Society, supra.*
[17]*Id.* at 2475.

price restraints attempt to equalize economic rewards for all physicians regardless of skill or experience and have the collateral effect of discouraging entry into specialty fields and experimentation.

4. *Whether the District Court erred in holding that the evidence, when viewed most favorably to Petitioners, did not warrant submission to the jury of the boycott issues.*

Respondents boycotted Petitioners by their program expressly intended to force the doctors, including Kasnetz, to charge only those fees and render only those services which Respondents had determined were reasonable according to their own established standards. Once these efforts failed, Respondents successfully dissuaded and prevented their insureds from using Petitioners to supply medical services, a classic group boycott.

In *Virginia Academy of Clinical Psychologists*,[18] the Court held that it was a restraint of trade for two Blue Shield plans to refuse payment for services rendered by clinical psychologists since this policy forced two independent economic entities to act as one with the effect of diminishing competition in the health care field.[19] This Court should not reject Petitioners' claims of group boycott and price fixing on the ground that Petitioners and Respondents are somehow not direct competitors. A close review of the decision in *Virginia Academy of Clinical Psychologists* reveals that the District Court here should have looked beyond the obvious relationship between Petitioners and Respondents and evaluated the impact of the challenged practice upon competi-

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[18] *Supra*.

[19] *Id.* at 484-485.

tive conditions.[20] Respondents' decisions as to who will be paid for medical services necessarily dictate which practitioners will be chosen from among those competent under the law to provide such services.

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[20]"The rule of reason looks to the impact of the challenged practice upon competitive conditions....The district court's finding that 'the clinical psychologist is not competitive with the psychiatrist in treating nervous and mental disorders...' reflects a value judgment rather than an evaluation of anticompetitive effects....The Blue Shield plans are dominant sources of health care coverage in Virginia. Their decisions as to who will be paid for psychotherapy necessarily dictate, to some extent, which practitioners will be chosen from among those competent under the law to provide such services." *Id.* at 485.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

DATED this 28th day of January, 1986.

Respectfully submitted,

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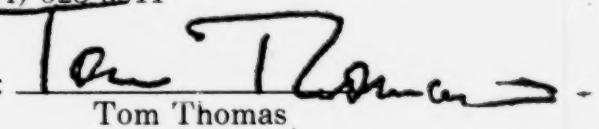
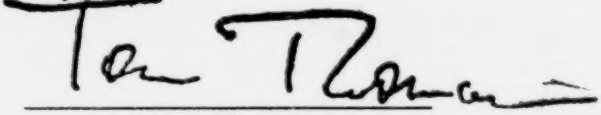
By: 
Tom Thomas
*Attorneys for Petitioners*

## CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument were forwarded in the United States mail, postage prepaid, to Mr. Curtis Frisbie, Gardere & Wynne, 1500 Diamond Shamrock Tower, Dallas, Texas 75201 on this 28th day of January, 1986.


Tom Thomas

# APPENDIX

# APPENDIX A

## Opinion of the United States Court of Appeals for the Fifth Circuit

*Irving Ear, Nose, Throat & Allergy Clinic and Herbert R. KASNETZ, M.D., Plaintiffs-Appellants*

*v.*

*Group Hospital Service, Inc., Group Life and Health Insurance Company, and Group Medical and Surgical Service Company, d/b/a Blue Cross and Blue Shield of Texas, Defendants-Appellees*

**No. 84-1404.**

United States Court of Appeals,
Fifth Circuit.
October 31, 1985.

Before RANDALL, HILL AND DAVIS, CIRCUIT JUDGES.

Davis, Circuit Judge:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellants, Herbert R. Kasnetz, M.D., an ear, nose, throat and allergy specialist, and his clinic, Irving Ear, Nose, Throat & Allergy Clinic, brought this action against three Texas corporations doing business as Blue Cross/Blue Shield of Texas, alleging violations of Section 1 of the Sherman Act, 15 U.S.C § 1. The district court directed a verdict in favor of the defendants. For the reasons set forth below, we affirm.

I.

The pertinent facts are undisputed. The three defendants to this action, Group Hospital Service, Inc. (GHS), Group Life & Health Insurance Company (GL&H), and Group Medical & Surgical Service (GM & SS), are licensed to operate under the service mark Blue Cross/Blue Shield of Texas. GHS was chartered in 1939 under Article 20 of the Texas Insurance Code as a non-profit hospital service company. GHS writes individual and group hospital plans. GL&H is a wholly-owned subsidiary of GHS, which was acquired by GHS in 1976. Since 1976, GL&H has underwritten group medical and surgical policies to complement the hospitalization policies written by GHS. GHS formed the third defendant, GM & SS, as a statewide mutual assessment, non-profit corporation under Article 14 of the Texas Insurance Code. This entity is owned by its policy holders. Before 1976, when GHS acquired GL&H, GM & SS marketed individual medical and surgical policies; after GHS acquired GL&H, GM&SS stopped writing new business and limited its activity to servicing existing contracts.

The officers of the three defendants operating under the Blue Cross/Blue Shield umbrella are identical. All sales and claims employees are carried on the payroll of GHS and they perform functions, as required, for all three companies. The twenty directors of GHS also serve on the boards of GL&H and GM & SS. The latter two entities have three additional directors. Common board meetings are held for all three entities.

Blue Cross/Blue Shield of Texas instituted a cost containment program in 1976 in which it undertook to reimburse

physicians fees on the basis of what it considered usual, customary, and reasonable (UCR) fees. Defendants established UCR fees for a number of individual medical procedures by reviewing actual fees charged by a large number of physicians practicing in a geographic area. It also evaluated physicians' patterns of practice to assess how often specific procedures were performed for a given number of patients. With this information, the insurer identified physicians who sought to charge fees it considered excessive or who performed medical services of questionable necessity. The insurer suggested that those physicians so identified reduce their charges and services to the acceptable range. If the physician did not agree to do so, the insurer declined to pay the physician and exercised the right granted to it in its policy to directly reimburse patients for services provided by these physicians based on the UCR charge.[1] In addition, claims for those physicians' services were subjected to closer prepayment scrutiny than that customarily given.

Kasnetz operated his ear, nose, throat and allergy clinic in Irving, Texas. Approximately one-third of his patients were insured by Blue Cross/Blue Shield. Until 1976, Kasnetz billed Blue Cross/Blue Shield directly for payment of patient services and the insurer routinely reimbursed the physician. In 1976, however, the insurer identified Kasnetz as a physician who performed medically unnecessary procedures and who assessed multiple charges for essentially the same services. The insurer informed Kasnetz that payment for covered services for its policy holder would be made to the policy holders and not to Kasnetz, and then only after prepayment review.

Kasnetz brought this action complaining that the insurer's cost containment program, which led to a reduction in his income and the size of his practice, violated Section 1 of the Sherman Act. He alleged: (1) horizontal and vertical price fixing; (2) horizontal group boycott; and (3)

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[1]Blue Cross/Blue Shield's standard policy provided for payment of a specified percentage of the reasonable charges for medically necessary services.

restraint of trade. At the close of the plaintiff's case after five days of jury trial, the district court directed a verdict in favor of the defendant insurer. The district court concluded that the evidence was insufficient to establish a conspiracy because the three defendants were a single economic entity incapable of conspiracy; alternatively, the district court assumed the defendants had the capacity to conspire and nevertheless found evidence of a Sherman Act violation insufficient to raise a jury issue.

II.

A.

We review this appeal from a directed verdict under the familiar *Boeing* standard and consider:

> [A]ll of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

*Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

To prevail under Section 1 of the Sherman Act, plaintiff must show a contract, combination or conspiracy, in restraint of trade or commerce. 15 U.S.C. § 1.

The district court based its decision that the defendant corporations lacked the capacity to conspire on the notion that the three defendants acted as a single entity. The defendants contend that *Copperweld Corp. v. Independence Tube Corp.,* U.S. , 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), supports the district court's ruling and is controlling. In *Copperweld,* the Court held that a parent corporation and its wholly-owned subsidiary have a "unity of purpose or a common design" and are incapable of conspir-

ing with each other. *See also Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316 (5th Cir. 1984). Under the teaching of *Copperweld*, the district court was clearly correct in concluding that GHS and its wholly-owned subsidiary, GL&H, are incapable of conspiring with each other. Because the alternate ground for the district court's ruling is solidly grounded in established law, we find it unnecessary to decide whether *Copperweld* should be extended to hold that GM & SS is incapable of conspiring with the other two defendants.

B.

In his complaint and in his brief on appeal, Kasnetz alleged per se violations of Section 1 by defendants in agreeing to fix prices and to conduct a horizontal boycott.[2] In addition, he alleged a conspiracy in restraint of trade, a Section 1 claim to be tested under the rule of reason. At oral argument, Kasnetz conceded that he had failed to establish a per se violation of Section 1 but argued that under the rule of reason, he had presented sufficient evidence to have his case submitted to the jury. We agree with the conclusion of the district court that insufficient evidence was adduced to present a jury issue on plaintiff's restraint of trade claim under a rule of reason analysis as well as his claim of a per se violation.[3]

---

[2]Actions identified by courts as per se violations include price fixing agreements and horizontal group boycotts and are presumed to have a pernicious effect on competition. Once per se illegal activity is shown, no evidence need be presented of anti-competitive effects. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

[3]The district court's decision to direct a verdict on the alleged per se violations is clearly correct on the undisputed facts presented in this case. The three defendants did not compete with each other, or hold themselves out as competitors. Also, Kasnetz provided medical services and did not sell health insurance so Kasnetz did not compete with the three defendants. Thus, no evidence of horizontal price fixing or illegal boycott by defendants was adduced. *See Plueckhahn v. Farmers Ins. Exchange*, 749 F.2d 241, 245 (5th Cir. 1985); *Blackburn v. Crum & Forster*, 611 F.2d 102, 104 (5th Cir.), *cert. denied*, 447 U.S. 906 (1980). Likewise, because Kasnetz sold no products, goods or services supplied him by the defendants, no evidence of a vertical link necessary to establish vertical price fixing (as in resale price maintenance) was presented. *See Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1438 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985).

To survive a motion for directed verdict on the restraint of trade claims, analyzed under a rule of reason, Kasnetz was required to adduce evidence tending to show that the alleged agreement had an effect on competition among physicians in his geographic area; he was required to present evidence of "antitrust injury, . . . injury of the type the antitrust laws were intended to prevent and flows from that which makes defendants' acts unlawful; the injury must reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1777).

Kasnetz presented evidence in support of his contentions that the insurer's cost containment program injured his practice and reduced his income but he did not demonstrate injury to competition in the market area. He showed that the insurer's effort to reduce medical costs had the effect of reducing the number of patients who came to him for care; those who had difficulty with reimbursement stopped using his services and no longer referred friends to him. Kasnetz did not show, however, that Blue Cross/Blue Shield's program affected competition among physicians of his specialty or among any physicians in his geographic area. Thus, Kasnetz utterly failed to present proof from which a reasonable person could infer an unreasonable restraint of trade.

AFFIRMED.

# APPENDIX B

## 15 U.S.C. § 1

**Trusts, etc., in restraint of trade illegal: penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1282

IN THE

# Supreme Court of the United States

## OCTOBER TERM 1985

IRVING EAR, NOSE, THROAT & ALLERGY CLINIC
and HERBERT R. KASNETZ, M.D.,

*Petitioners*

*VS.*

GROUP HOSPITAL SERVICE, INC.,
GROUP LIFE & HEALTH INSURANCE COMPANY
and GROUP MEDICAL AND SURGICAL SERVICE
COMPANY, d/b/a BLUE CROSS AND BLUE
SHIELD OF TEXAS,

*Respondents*

## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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U.S. District Court
Northern District of Texas
**FILED**
May 8, 1984
Nancy Hall Doherty, Clerk
By _____
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

---

IRVING EAR, NOSE, THROAT & ALLERGY CLINIC, ET AL.

*Plaintiffs*

*VS.*

GROUP HOSPITAL SERVICE, INC., ET AL.

*Defendants*

**Civil Action No. 3-81-1786-H**

---

## ORDER

This case is before the Court on Plaintiffs' Motion to Dismiss for Want of Jurisdiction, filed April 27, 1984; and Defendants' Response, filed May 3, 1984. This case was tried before the Court with a jury April 2-6, 1984. On April 5, 1984, the Court severed Defendants' counterclaim and ordered a separate trial thereon. On April 6, 1984, the Court granted Defendants' Motion for a Directed Verdict and dismissed Plaintiffs' suit with prejudice.

Plaintiffs' suit involved a claim for damages under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.* Defendants' counterclaim seeks attorney's fees and costs arising from Plaintiffs' state antitrust claims. Defendants'

counterclaim is brought pursuant to section 15.21(a)(3) of the Texas Business and Commerce Code. Plaintiffs withdrew their state antitrust claims before the case was tried. Defendants' counterclaim, therefore, remained only by virtue of pendent jurisdiction. Following the directed verdict and dismissal of Plaintiffs' suit, all federal claims were disposed of, and Defendants' counterclaim based on the state statute is the only remaining claim. In the absence of an independent jurisdictional basis for exercising jurisdiction over Defendants' counterclaim, the counterclaim should be dismissed without prejudice. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Scranton Construction Co., Inc. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

As Defendants point out, their cause of action under section 15.21(a)(3) accrued not earlier than the statute's effective date, August 29, 1983. Thus, Defendants will encounter no statute of limitations problems in refiling their claim in state court. The Court does not agree with Defendants that section 15.21(a)(3) only provides relief to counterclaimants. Rather, a fair reading of the statute precludes any such restrictive interpretation of the section 15.21(a)(3) cause of action. The Court finds that dismissal of the counterclaim without prejudice will not have an adverse impact on the litigants in this suit. *See Transource International, Inc., et al. v. Trinity Industries, Inc.*, 725 F.2d 274, 290 (5th Cir. 1984); *Hensen v. Columbus Bank and Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981).

In sum, the Court has no original jurisdiction of Defendants' non-diversity state law counterclaim and there is now no basis for exercising pendent jurisdiction. Accordingly, the counterclaim is hereby DISMISSED without prejudice for want of jurisdiction.

SO ORDERED.
DATED: May 8, 1984.

BAREFOOT SANDERS
United States District Judge

U.S. District Court
Northern District of Texas
**FILED**
May 8, 1984
Nancy Hall Doherty, Clerk
By _____
Deputy

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION**

---

IRVING EAR, NOSE, THROAT & ALLERGY CLINIC, and HERBERT R. KASNETZ, M.D.

*Plaintiffs*

*VS.*

GROUP HOSPITAL SERVICE, INC., ET AL.

*Defendants*

**Civil Action No. 3-81-1786-H**

---

## FINAL JUDGMENT

All matters in controversy having been disposed of by the Court's Orders dated April 6, 1984, and May 8, 1984, the Court is of the opinion that this Final Judgment should be entered.

It is therefore ORDERED, ADJUDGED and DECREED by the Court, as follows:

1. Plaintiffs Irving Ear, Nose, Throat & Allergy Clinic and Herbert R. Kasnetz, M.D., take nothing by their suit against Defendants Group Hospital, Group Life & Health Insurance Company, Group Medical and Surgical Service Company d/b/a Blue Cross of Texas, and Blue Shield of

Texas, and Plaintiffs' claims are DISMISSED on the merits at Plaintiffs' cost.

2. Defendants' counterclaim is DISMISSED without prejudice for want of jurisdiction.

3. Any other relief sought by any party in this case and not specifically granted hereby, is DENIED.

SIGNED this 8th day of May, 1984.

BAREFOOT SANDERS
United States District Judge

Supreme Court, U.S.
FILED
FEB 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1282

IN THE

# Supreme Court Of The United States

October Term 1985

IRVING EAR, NOSE, THROAT & ALLERGY CLINIC and HERBERT R. KASNETZ, M.D.,

*Petitioners,*

*v.*

GROUP HOSPITAL SERVICE, INC., GROUP LIFE & HEALTH INSURANCE COMPANY and GROUP MEDICAL & SURGICAL SERVICE COMPANY d/b/a BLUE CROSS AND BLUE SHIELD OF TEXAS,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## MOTION OF RESPONDENTS FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

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30 pp

## QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari fails to comply with Supreme Court Rule 17.1 by failing to state any special and important reasons for review of this action by this Court?

2. Whether this Court should grant certiorari to decide the hypothetical issue of whether one of the three Respondent Blue Cross/Blue Shield companies had the legal capacity to combine or conspire with the other two, where the trial court found that they did not in fact conspire, and the Court of Appeals found it unnecessary to decide the legal capacity issue?

3. Whether this Court should review Petitioners' claims of *per se* price fixing and boycott, when Petitioners have already conceded in the Court of Appeals that they "failed to establish a per se violation," and the Court of Appeals also found that the trial court's rejection of such claims was "clearly correct"?

4. Whether this Court should grant certiorari to determine whether the courts below erred in concluding that Petitioners failed to demonstrate the requisite anticompetitive effect to establish a Sherman Act violation under the rule of reason?

5. Whether the petition for writ of certiorari is frivolous as defined by Supreme Court Rule 49.2 and, if so, whether damages should be awarded to Respondents?

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No. 85-1282

IN THE

# Supreme Court Of The United States

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IRVING EAR, NOSE, THROAT & ALLERGY CLINIC and HERBERT R. KASNETZ, M.D.,

*Petitioners,*

*v.*

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## MOTION OF RESPONDENTS FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

### OPINIONS AND JUDGMENTS BELOW

The unanimous, unpublished opinion of the United States Court of Appeals for the Fifth Circuit is reported at 1985-2 Trade Cases (CCH) ¶ 66,849 (5th Cir. Oct. 31, 1985) and is reproduced in appendix A to the petition for writ of certiorari.[1] The final judgment of the United States District Court for the Northern District of Texas is reproduced in the supplemental appendix to the

petition for writ of certiorari. The district court's statement of its reasons for granting Defendants/Resondents' motion for directed verdict is reproduced in appendix A herein.

## PERTINENT STATUTES AND RULES

### Statutes

Sherman Antitrust Act, Section 1, 15 U.S.C. § 1

Texas Insurance code, article 20.13

Federal Rules of Civil Procedure

Fed. R. Civ. P. 52(a)

Supreme court rules

Sup. Ct. R. 17.1

Sup. Ct. R. 49.2

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[1]Pursuant to Fifth Circuit Local Rule 47.5, the court below determined that its opinion should not be published because it has no precedential value and merely decides this particular case on the basis of well-settled principles of law.

## STATEMENT OF THE CASE

Respondents ("Blue Cross/Blue Shield") adopt the statement of facts contained in the opinion of the Court of Appeals. Petition, App. A. Following that opinion, Petitioners ("Kasnetz") timely filed the petition for writ of certiorari.

## SUMMARY OF ARGUMENT

This is a frivolous appeal.

This case is inappropriate for review on writ of certiorari. No "special and important" reasons for granting review arise in this case, and none are stated in the petition. There is no conflict between the opinion of the Fifth Circuit in this case and the decisions of other circuits or of this Court. Both the district court and the Fifth Circuit applied the correct standards of judgment and review and neither court departed from the accepted and usual course of judicial proceedings in deciding this controversy. Kasnetz' petition merely seeks *de novo* review of the lower courts' findings that his factual evidence was insufficient to present a jury question.

Certiorari should not be granted to review the issue of whether one of the three Blue Cross/Blue Shield companies had the legal capacity to conspire with the other two. Petitioners fail to demonstrate or even argue that the trial court's factual finding—that no such combination or conspiracy was shown by the evidence—was clearly erroneous. Moreover, the Court of Appeals found it unnecessary to decide this legal issue because the alternate ground for dismissal of Petitioners' case is well grounded in established law.

There is absolutely no reason to grant certiorari so that this court can review Petitioners' claims of *per se* antitrust violation. Petitioners conceded in the Fifth Circuit that they "failed to establish a *per se* violation." Petition, p. A-5. There is simply no rea-

son why the Petitioners should be permitted to resurrect this claim in the Supreme Court. Their request for review of the *per se* issue is frivolous.

Petitioners' request for *de novo* review of the Fifth Circuit's conclusion that they "utterly failed" to present sufficient factual evidence of injury to competition in the relevant market is also frivolous. The only evidence relied upon by Petitioners in this regard was found to be woefully inadequate, and Petitioners fail to offer any valid reason to question that conclusion.

The petition is frivolous as it seeks merely a *de novo* review of facts and clearly correct conclusions of the courts below, and it contains no valid reasons for the granting of certiorari. Accordingly, the petition for certiorari should be denied and Blue Cross/Blue Shield should recover the expenses it incurred in responding to the petition.

## ARGUMENT

### 1. THE PETITION FAILS TO SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI CONTAINED IN RULE 17.1 OF THE SUPREME COURT RULES.

This is not an appropriate case for review by this Court. Review on writ of certiorari is a matter of discretion, "and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. The petition is frivolous because the issues it raises do not even arguably meet the standards set forth in Supreme Court Rule 17.

Rule 17.1(a) indicates that certiorari may be granted "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals." The trial judge's refusal to find the facts as Petitioners would have found them does not mean that the opinion in this case is in conflict with decisions

of other circuits. Although Petitioners seem to allege the proof of certain facts, their argument merely goes to the weight of the evidence.

Rule 17.1(a) also indicates review may be granted where a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." The district court did not depart from accepted judicial proceedings by granting Blue Cross/Blue Shield's motion for a directed verdict. The Fifth Circuit did not sanction any such departure because there never was one. Rather, the Fifth Circuit's application of the familiar directed verdict standard on appeal, pursuant to *Boeing Company v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc), was entirely in accordance with the accepted and usual course of judicial proceedings.

Petitioners were given a full and fair opportunity to present all their evidence against Blue Cross/Blue Shield at trial and to have such evidence reviewed by the Court of Appeals. The trial court's finding that Petitioners' evidence was insufficient to present a jury question on their claims, and the Fifth Circuit's unequivocal agreement with that conclusion, do not constitute any departure from normal judicial procedure.

Finally, the dismissal of the claims against Blue Cross/Blue Shield because of insufficient evidence did not decide "an important [unsettled] question of federal law," or create a "conflict with applicable decisions of this court." Sup. Ct. R. 17.1(c). In fact, the trial court's ground of dismissal relied upon by the Fifth Circuit "is solidly grounded in established law." *Irving Ear Nose, Throat & Allergy Clinic v. Group Hospital Service Co.,* 1985-2 Trade Cases (CCH) at 64,217. [Petition, p. A-5]. The ruling of the lower courts in the present case does not conflict with any applicable decisions of this Court. In fact, it is compelled by such decisions.

Far from making the requisite showing that there are "special and important reasons" why review should be granted in this case, Petitioners have failed to show any reasons why this case should be heard by the Supreme Court. Therefore, certiorari should be denied.

## 2. THERE IS NO REASON FOR THIS COURT TO DECIDE WHETHER THE BLUE CROSS/BLUE SHIELD COMPANIES HAD THE LEGAL CAPACITY TO COMBINE OR CONSPIRE UNDER § 1 OF THE SHERMAN ACT, WHERE THE TRIAL COURT FOUND THAT THEY DID NOT, IN FACT, COMBINE OR CONSPIRE, AND THE COURT OF APPEALS FOUND IT UNNECESSARY TO DECIDE THE LEGAL ISSUE.

Petitioners first urge this Court to decide whether the Blue Cross/Blue Shield companies had the capacity to combine or conspire under § 1 of the Sherman Act. Petition, p. 6. The trial court concluded that the Blue Cross/Blue Shield companies "did not, in fact, combine or conspire to violate § 1 of the Sherman Act." Petition, p. 5. Petitioners now improperly seek review of this factual finding. On review, the factual decisions of the trial court are subject to revision only where "clearly erroneous." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948); Fed. R. Civ. P. 52(a). Petitioners have failed to address this standard, much less demonstrate that the trial court's factual determination in this regard was "clearly erroneous."

The Court of Appeals found it unnecessary to decide the question of GMSS' ability to conspire with the other two Blue Cross/Blue Shield companies because the alternate ground for the district court's ruling "is solidly grounded in established law." *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-2 Trade Cases (CCH) at p. 64,217 (5th Cir. Oct. 31, 1985) [Petition, p. A-5]. Under these circumstances,

there is no reason for this Court to decide this issue in the highly fact-specific case at hand.

Finally, Petitioners' argument on the issue of ability to conspire is premised on a purely hypothetical situation. The lower courts' conclusion that GHS and its wholly owned subsidiary, GLH, are legally incapable of conspiring with each other was undisputedly correct. *Copperweld Corp. v. Independence Tube Corp.*, ____ U.S. ____, 104 S.Ct. 2731, 2745 (1984). The only related question posed by the petition is whether GMSS was capable of conspiring with the other two Blue Cross/Blue Shield entities, GHS and GLH. Petition, p. 6. It is undisputed that GMSS does not actually compete with either GHS or GLH. Notwithstanding this simple, dispositive fact, Kasnetz contends that GMSS' "potential ability to compete" with the other Blue Cross/Blue Shield companies is controlling on the issue of capacity to conspire. Petition, p. 8. Kasnetz cites no legal authority in support of this bald assertion. This is not surprising since horizontal combinations in restraint of trade are agreements among actual competitors. *E.g., Plueckhahn v. Farmers Insurance Exchange,* 749 F.2d 241, 245 (5th Cir.), *cert. denied,* 105 S.Ct. 3527 (1985). Cases should be decided on the basis of the evidence as to what actually happened, not what could have happened. There is no reason why the question of "potential ability to conspire" should even be addressed by this Court.

## 3. THERE IS NO REASON TO REVIEW PETITIONERS' CLAIM OF PER SE VIOLATION.

### A. PETITIONERS HAVE CONCEDED THAT THEY FAILED TO ESTABLISH A PER SE VIOLATION.

Even assuming, *arguendo,* that the Blue Cross/Blue Shield companies had the legal capacity to combine or conspire and somehow in fact formed a combination or conspiracy, the alleged restraint in issue does not constitute an antitrust violation.

In their petition, Petitioners contend that they proved a *per se* violation of § 1 of the Sherman Act. Petition, p. 10. But the court of Appeals stated: "At oral argument, Kasnetz conceded that he had failed to establish a per se violation." *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-2 Trade Cases (CCH) at p. 64,217 [Petition, p. A-5]. Having conceded this issue in the court below, Petitioners should not now be permitted to resurrect it in this Court.

### B. THE DISTRICT COURT'S DECISION TO DIRECT A VERDICT ON THE ALLEGED PER SE VIOLATIONS IS CLEARLY CORRECT ON THE UNDISPUTED FACTS PRESENTED IN THIS CASE.

Even if the "merits" of Petitioners' *per se* argument should be considered herein, such argument is utterly frivolous. The Court of Appeals held: "The district court's decision to direct a verdict on the alleged per se violations is clearly correct on the undisputed facts presented in this case." *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-2 Trade Cases (CCH) at p. 64,217 n.3 [Petition, p. A-5]. The undisputed facts are that the three Blue Cross/Blue Shield companies did not compete with each other, or hold themselves out as competitors. Kasnetz, a physician, did not sell health insurance, so Kasnetz did not compete with any of the Blue Cross/Blue Shield companies. *Id.* Thus, "no evidence of horizontal price fixing or illegal boycott was adduced." *Id.* (citing *Plueckhahn v. Farmer's Insurance Exchange*, 749 F.2d 241 at 245; and *Blackburn v. Crum & Forster*, 611 F.2d 102, 104 (5th Cir.), *cert. denied*, 447 U.S. 906 (1980)).

Petitioners' reliance on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) is misplaced. In *Maricopa*, the Court invalidated a horizontal agreement among competing physicians concerning their maximum charges in a prepaid health care plan organized and controlled by them. The *per se* unlawful

horizontal price fixing at issue in *Maricopa* is far different from the alleged vertical relationship here.[2] In fact, *Maricopa* notes that health insurers may lawfully establish their maximum reimbursable rates.

> This program and the Blue Shield plan challenged in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) indicate that insurers are capable . . . of fixing maximum reimbursable prices . . . . [N]othing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way [than by horizontal agreement among providers].

457 U.S. at 353.

Petitioners' reliance on *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) is also misplaced. In *Virginia Academy*, private physicians controlled a majority of the board of directors of the Blue Shield in Virginia, in accordance with that Blue Shield plan's by-laws. *Id.*, 624 F.2d at 479-481. In the instant case, there is no such private physician control. Rather, the board of directors of GHS is composed of twenty directors, of whom no more than three may be private physicians and one a dentist. Texas Insurance Code Annotated Article 20.13 (Vernon 1981). Appendix B. The boards of directors of GLH and GMSS are similarly composed. Petition, p. A-2. Private physicians simply do not control Blue Cross/Blue Shield of Texas. Petitioners' argument that some employees of Blue Cross/Blue Shield are also licensed physicians misses the point that the board of directors has the ultimate responsibility for Blue Cross/Blue

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[2]Several recent health care opinions similar to the present case have expressly held that *Maricopa* is simply not on point. E.g., *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 930 (1st Cir. 1984), *cert. denied*, 105 S.Ct. 2040 (1985); *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985).

Shield's business decisions, and only a small minority of such board members are physicians. The horizontal aspect of the *Virginia Academy* case is absent in the present case. Thus, Petitioners' claim or *per se* horizontal price fixing is clearly without merit.

Moreover, as the court below correctly noted, Petitioners sold no products, goods or services supplied to them by Blue Cross/Blue Shield, so there is no resale transaction involved at all; thus, a *per se* vertical price fixing (resale price maintenance) theory is clearly inappropriate. Petition, p. A-5 n.3 (citing *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433, 1438 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985)). In sum, there is no plausible basis for Petitioners' previously abandoned claim of *per se* price fixing, whether it be horizontal or vertical; it need not be reviewed by this Court.

Petitioners also contend that this case presents "a classic group boycott," Petition, p.12, which warrants *per se* condemnation. It does not. When, as in this case, a boycott allegation "does not present the classic case of a boycott in which a group of business competitors seeks to benefit economically by excluding other competitors from the market place," *per se* analysis does not apply. *Plueckhahn v. Farmers Insurance Exchange*, 749 F.2d at 246.

This Court has recently cautioned against unwarranted application of the *per se* rule in group boycott cases which do not involve efforts to disadvantage competitors or the likelihood of predominantly anticompetitive effects. *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*, ___U.S. ___, 105 S.Ct. 2613, 2619-20 (1985) (rule of reason applied to group boycott claim). Because none of the parties in this case is a competitor with any of the others, there is no horizontal aspect to their relationship. No effort to disadvantage any competing insurer is even suggested. And there are no predominantly anti-

competitive effects involved. Accordingly, the *per se* rule clearly is not applicable to the group boycott claim. *Id.; Plueckhahn,* 749 F.2d at 245; *Royal Drug Co. v. Group Life & Health Insurance Co.,* 737 F.2d 1433, 1436-1439 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 912 (1985) ($2 cap on balance billing by pharmacies were "novel restraints with potential procompetitive effects"); *Kartell v. Blue Shield of Massachusetts, Inc.,* 749 F.2d 923 (1st Cir. 1984), *cert. denied,* 105 S.Ct. 2040 (1985).

## 4. THE COURTS BELOW CORRECTLY HELD THAT PETITIONERS FAILED TO ESTABLISH THE REQUISITE ANTICOMPETITIVE EFFECT UNDER THE RULE OF REASON.

The Court of Appeals correctly held that Petitioners had "utterly failed to present proof from which a reasonable person could infer an unreasonable restraint of trade," because the requisite anticompetitive effect was not demonstrated. Petition, p. A-6. Petitioners now contend that the testimony of one of their witnesses, Dr. Wade Clifton, an economist, demonstrated injury to competition in the geographic market area and among physicians of Dr. Kasnetz' specialty. Petition, p. 9. & n. 5. [Tr. 767-768]. But the trial testimony of Dr. Clifton falls far short of proving the requisite injury to competition. In truth, a review of the testimony of Dr. Clifton reflects the candid admission that he had never done a study of the effect of Blue Cross activities on other doctors' practices. Tr. 831.

The actual evidence on this point showed merely that two doctors in the adjoining city of Dallas, one of whom was an ear, nose and throat specialist, were placed on prepayment review status by Blue Cross/Blue Shield during 1982. Tr. 180-185; 829-831. Even if it is conceded that both of them were competitors of Dr. Kasnetz in the relevant geographic and product markets, the mere fact that two such doctors were also under review for possibly excessive billing or performing unnecessary treatment hardly

demonstrates the requisite "injury to competition." Petitioners did not establish how many such competitors existed in the relevant market, nor the effect on other physicians' practices as a result of Blue Cross/Blue Shield's actions. Blue Cross/Blue Shield does business with virtually all of the 24,000 physicians in Texas. Tr. 828-829. Only about 150 of them were even on prepayment review status at the time of trial. Tr. 828.

Both of the courts below correctly applied the usual *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) standard and both emphatically concluded that Petitioners failed to present sufficient evidence to go to a jury on which a finding could be based that Blue Cross/Blue Shield's actions resulted in the requisite injury to competition. (Appendix A, pp. A-4–A-5; Petition, p. A-6).

Petitioners now simply seek to rehash this same issue for the third time in the Supreme Court. Under these circumstances, the petition for certiorari can only be described as frivolous, and review should be denied.

## BLUE CROSS/BLUE SHIELD'S MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

### 5. THE PETITION FOR CERTIORARI IS FRIVOLOUS AND BLUE CROSS/BLUE SHIELD SHOULD BE AWARDED DAMAGES PURSUANT TO SUPREME COURT RULE 49.2.

Supreme Court Rule 49.2 provides:

> When an appeal or petition for a writ of certiorari is frivolous, the court may award the appellee or the respondent appropriate damages.

This rule should be invoked in this case because Petitioners' petition is frivolous in that it does not even arguably present an appropriate case for review by this court under Supreme Court Rule

17.1. It seeks *de novo* review of the trial court's factual findings by concocting frivolous legal issues claimed to be appropriate for Supreme Court review. Petitioners carelessly misstate applicable precedent. The holdings of the courts below are clearly grounded in established law. In sum, the filing of the petition in this case is an abuse of this Court's general policy of open access to litigants.

Attorneys have long been on notice, pursuant to the Supreme Court Rules, that frivolous petitions might result in an award of damages to the opposing party. This case provides the Court with the opportunity to discourage patently meritless applications and thereby minimize the time devoted by the Court to the disposition of such applications, which is the purpose of Rule 49.2. Lawyers have not only the right, but a duty, to decline to press a frivolous case which would impose unnecessary burdens on the courts while legitimate claims wait to be determined. Supreme Court Rule 49.2 is a prudent measure by which to curb the increasing flow of meritless appeals to this Court through attorney self-regulation. To this end, Blue Cross/Blue Shield respectfully submits that this Court should apply Rule 49.2 in this case.

This Court recently discussed the standards for application of Rule 49.2. In *Talamini v. Allstate Insurance Company*, ___ U.S. ___, 105 S.Ct. 1824 (1985), Chief Justice Burger, joined by Justices Rehnquist and O'Connor, stated: "Rule 49.2 has a purpose which has too long been ignored; it is time we applied it." 105 S.Ct. at 1825. While it is true that Rule 49.2 and its predecessors have rarely been invoked, *id.*, 105 S.Ct. at 1827 n.7, that is no reason to continue the same policy. Indeed, the reverse is true. Experience shows that the old policy has failed to stem the present flood of meritless litigation. Blue Cross/Blue Shield respectfully submits that this action is worthy of application of the sanctions provided by Rule 49.2.

For the foregoing reasons, Blue Cross/Blue Shield respectfully requests that the Court award reasonable expenses, including attorney's fees, incurred by Blue Cross/Blue Shield as a result of Petitioners' frivolous petition for certiorari.

## CONCLUSION

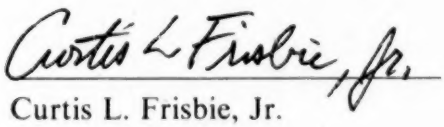
The petition for writ of certiorari should be denied.

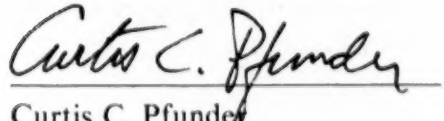
Damages should be awarded to Blue Cross/Blue Shield pursuant to Supreme Court Rule 49.2.

Dated this 28th day of February, 1986.

Respectfully submitted,

GARDERE & WYNNE

By: 
Curtis L. Frisbie, Jr.
Counsel of Record

By: 
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## APPENDIX A

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

IRVING, EAR, NOSE, THROAT & ALLERGY CLINIC and HERBERT R. KASNETZ, M.D.,

*Plaintiffs,*

v.

GROUP HOSPITAL SERVICE, INC., GROUP LIFE & HEALTH INSURANCE CO., GROUP MEDICAL AND SURGICAL INSURANCE COMPANY, d/b/a BLUE CROSS OF TEXAS AND BLUE SHIELD OF TEXAS,

*Defendants.*

Docket No.
CA3-81-1786-H

Dallas, Texas
April 6, 1984
2:00 O'Clock, P.M.

## VOLUME VI
## TRANSCRIPT OF PROCEEDINGS COURT'S RULING ON MOTION FOR INSTRUCTED VERDICT BEFORE THE HONORABLE BAREFOOT SANDERS

THE COURT: As counsel are well aware, after I recessed the jury for lunch I heard argument on Defendants' Motion for a Directed Verdict. It is a matter not so much as the Motion itself but th law of the case which has been concerning me for quite some time. I have decided to grant the Motion and I will spell out at this time fairly briefly the reasons for doing it.

As I view it, this is a case about a health insurance company, Blue Cross and Blue Shield, which has refused to pay Plaintiffs

for claims for medical services which it deems unnecessary and claims for medical services which it deems not usual, customary and reasonable and that is the lawsuit. Only one insurance company is involved. No other insurance company, no competitor of Blue Cross-Blue Shield is involved. Plaintiff is not insured by the Defendants although some of his patients quite obviously are.

The first essential element of a claim for relief under Section 1 of the Sherman Act is that there be a "contract combination of conspiracy as set forth in 15 U.S.C.A. Section 1. Common ownership does not by itself preclude Sherman Act Section 1 liability for possible conspiracy or combinations between affiliated corporations or parents and subsidiary corporations."

Between Mr. Henry and myself we tried to read a good many cases this week. I will cite a few.

*Perma life Mufflers, Inc. v. International Parts Corporation,* 392 U.S. 134 at 131, 142, a 1968 Supreme Court case.

*Kiefer-Stewart Co. v. Seagram,* 340 U.S. 211 at 215, rehearing denied 340 U.S. 1939, 1951.

*Gibbons, Inc. v. Crawford Fitting,* 704 F.2d 787 at 795, a 1983 Fifth Circuit case.

*H & B Equipment Company, Inc. v. International Harvester,* 577 F.2d 239 at 244.

Further, separate ownership or separate incorporation that is to say is not dispositive. The court must examine the substance of corporate relationship rather than its form. In addition to that and I quote "An important element in this capacity to conspire has been that the separate corporations be in the position of competitors" citing *Gibbons v. Crawford Fitting* which I mentioned a moment ago, this time at 795 and H & B Equipment Company I cited a moment ago at page 244.

In this case the three Defendants, Group Hospital, Group Life & Health and Group Medical are all under the same egis. Their

Boards of Directors are virtually identical. The Boards of all three meet in a simultaneous meeting, tha. is all together. The companies act as a single entity. The individual corporate form of each Defendant is purely a matter of form and is of no substantive effect or importance for purposes of this case or the antitrust laws.

Furthermore, the three companies have not been shown to be in any way competitors or in competing positions. Group Hospital is a non-profit corporation which sells hospitalization and medical and surgical insurance while Group Life sells life and disability and Group Medical and Surgical has not been active as a business entity since 1976. All three are licensed under the trade name Blue Cross and/or Blue Shield. All employees as best I could discern from the evidence apparently perform functions for all three companies. Indeed, the Defendant companies are so intertwined and indistinguishable that Defendants' employees are often not certain which company they are working for since the employees are interchanged between the companies constantly and as I say indistinguishable. The three companies as I say act as one. They do not compete and in fact and in law for antitrust purposes they are one and the same entity.

So I find and conclude that the Defendants do not have the capacity to combine or conspire nor indeed did they combine or conspire as a matter of law. The first element of the Sherman Act not being met the Motion should be granted on that ground alone.

Several grounds are presented to me. I will take it one step further.

Even if the Defendants had the capacity to combine or conspire I find that the Plaintiffs have failed to present legally sufficient evidence of price fixing, refusal to deal or secondary boycott and therefore they could not go to the jury on that element. I will discuss that in a little bit of detail.

The Plaintiffs contend that the Defendants' conduct constituted a per se horizontal refusal to deal and a per se horizontal second-

ary boycott, both violations of Section 1. There is quite obviously no evidence that the Plaintiffs are competitors with the Defendants. There is no evidence of any form of horizontal competition between the parties. As the Fifth Circuit has stated scope is properly given to the per se doctrine "in cases in which the plaintiff the excluded party is on the same competitive level with one member of the conspiracy. In other words, in such cases it may be proper to infer anticompetitive motive and effect because a conspiracy has a horizontal aspect."

That was a case out of the Northern District of Texas, *Blackburn v. Crum & Forster,* 611 F.2d 102 at 104, Fifth Circuit 1980. However, the Circuit went on to hold in Blackburn that where the defendants are not competitors with the plaintiffs and the case contains no horizonal aspects, the per se rule is inapplicable. See Blackburn at page 104. This holding was also applied in a similar situation in *McQuade Tours v. Consolidated Air Tour Manual Committee,* 467 F.2d 178 at 185-187, a 1972 Fifth Circuit case, cert. denied 409 U.S. 1109, 1973.

Just as in Blackburn and McQuade I find that there is no evidence of a horizontally competitive situation or relationship between Plaintiffs and Defendants. Absent horizontal aspect the Court must apply the rule of reason analysis to Plaintiffs' refusal to deal and secondary boycott allegations. See *Continental T.V. v. GTE Sylvania,* 433 U.S. 36 at 58, 1977 and also see Blackburn and McQuade that I have cited.

Now, the Plaintiffs also contend that Defendants' actions constitute a per se price fixing violation of Section 1. To reiterate, the evidence is lacking. In fact, I would say the record is devoid of any indication of any horizontal price restraints imposed on Plaintiffs by Defendants. Thus any price fixing allegations must satisfy standards for vertical price restraints to achieve a per se treatment. The Court is unable to find, and I have looked for it, any statement of law and I find nothing directly in point in what has been produced by the Plaintiffs any statement that would constitute an application of vertical price restraint rules, the type of conduct in issue here. While the Court recognizes that the experi-

ence of other courts with price restraints often results in language talking about *per se* and in *per se* considerations because of the pernicious nature of many price restraints, nonetheless this case does not present the vertical or horizonal aspects or anticompetitive effect to justify per se treatment. In that regard counsel are aware of and the Court has consulted *Arizona v. Maricopa County Medical Association,* 102 Supreme Court 2466, 1982 which was a per se price fixing analysis applied by the court and I have been interested in the discussion there.

So Plaintiffs' Section 1 claims must be considered in light of the rule of reason. However, in cases where the rule of reason analysis is applied to Section 1 claim the Plaintiffs must present evidence that the Defendants' conduct has had an adverse effect upon competition itself, not merely upon the Plaintiffs' business and as counsel are aware, there are numerous authorities on that, noteably *Brunswick Corporation v. Pueblo,* 429 U.S. 477 at 489, a 1977 case.

*Alameda Mall, Inc. v. Houston Lighting and Power,* 615 F.2d 343 at 353, Fifth Circuit, cert. denied 449 U.S. 870, 1980.

The Court finds that while the Plaintiff has presented evidence on the issue of their own injury, they have failed to present evidence sufficient to go to a jury on which a finding could be based that Defendants' acts have had an anticompetitive effect, that competition has in any way been injured or that anticompetitive acts have been made possible by Defendants' alleged violations. And counsel may consult the Brunswick case and also Blackburn and McQuade.

Accordingly I am of the view that there is no jury issue under the rule of reason as to anticompetitive effect.

So on these two grounds separately and cumulatively the Motion is granted. I do not reach the merits of the other grounds for the Motion although they may indeed have merit and I will enter a judgment of dismissal with prejudice.

Now, I want to say just this. You may have a complaint, Doctor. I don't know that. I don't think you have a Federal antitrust case quite obviously. I think you have been superbly represented in this lawsuit.

This Court will be in recess.

# APPENDIX B

## STATUTES AND RULES RELEVANT TO BRIEF IN OPPOSITION AND MOTION FOR DAMAGES

### SHERMAN ANTITRUST ACT, §1, 15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishements, in the discretion of the Court.

### TEXAS INSURANCE CODE ARTICLE 20.13:

Art. 20.13: Personnel of Directors

Such corporation shall have 20 directors who shall have full control over its management affairs. The board of directors shall be composed of persons who are residents of Texas. Not more than five directors may be persons who are chief executive officers or owners of an institutional health care provider. Not more than three directors may be persons licensed by the Texas State Board of Medical Examiners. Not more than one director may be a person licensed by the Texas State Board of Dental Examiners. The remaining directors shall not be health care providers or employees of or have a financial interest in a health care provider as defined in this chapter.

### FEDERAL RULE OF CIVIL PROCEDURE 52(a):

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgments shall be

entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of this action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

**SUPREME COURT RULE 17.1:**

**CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI**

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

**SUPREME COURT RULE 49.2:**

When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

## CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Motion of Respondents for Damages Pursuant to Supreme Court Rule 49.2 have been forwarded by certified mail, return receipt requested, to Tom Thomas, Kolodey, Thomas & Yeager, 1111 Two Turtle Creek Village, Dallas, Texas 75219, on this 28th day of February, 1986.

Curtis L. Frisbie, Jr.

Curtis L. Frisbie, Jr.